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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

NEHEMIAH ROBINSON, Plaintiff, **v.** **T. CATLETT, et al.,** Defendant.	08-CV-00161-H (BLM) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT** Date: July 29, 2008 Time: 9:00 a.m. Courtroom: Suite 5140 Judge: The Honorable Barbara L. Major

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I.

INTRODUCTION

Nehemiah Robinson, proceeding in pro se, is California prison inmate currently incarcerated at Calipatria State Prison, Calipatria, California. Plaintiff's Complaint, which is brought under 42 U.S.C. § 1983, alleges various Defendants violated Plaintiff's First, Eighth and Fourteenth

Amendment rights as well as his rights under the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq*. and the Rehabilitation Act, 29 U.S.C. § 794. Plaintiff alleges he suffers from severe significant collagen vascular disease, post-traumatic degenerative arthritis, a valugs deformity of the right knee and a lateral meniscal tear which cause him pain and require him to be housed in a lower bunk and to use a cane. (Compl. p.7 ¶¶ 1-2.) In his four counts, Plaintiff alleges he was denied a lower bunk, he was denied use of a cane due to a false report, he was otherwise denied use of a cane, and he was denied pain medication. Defendants ask this Court to dismiss Plaintiff's Complaint in its entirety because he does not state a claim against any Defendant.

II.

PLAINTIFF'S ALLEGATIONS AND FACTS TO BE CONSIDERED

A. Facts Relating To the Lower Bunk.

On or about February 6, 2006, Plaintiff was moved to a new housing area and assigned to the upper bunk. Plaintiff's cell mate, who suffered from a bad back, a bad knee and weighed well over 230 pounds, was assigned to the lower bunk. (Compl. p. 7 ¶ 3.) On that day, Plaintiff allegedly told Defendant Catlett he had a chrono entitling him to a lower bunk (i.e. "lower bunk chrono"). (*Id*.) On or about March 17, 2006, Plaintiff allegedly submitted to Defendant Garett an inmate appeal (aka a "602") along with a copy of the lower bunk chrono. (*Id*. pp. 7-8 ¶ 3.) Garrett allegedly gave Plaintiff this paperwork back and instructed Plaintiff to submit it to his co-worker, Defendant Arvizu, because Garrett did not have time to look into the issue. (*Id*.) Plaintiff allegedly gave this 602 paperwork to Defendant Arvizu, and on March 18, 2006, asked Arvizu if he had given the paperwork to Catlett. (*Id*. p. 8 ¶ 4.) Defendant Arvizu allegedly informed Plaintiff he had given the 602 paperwork to Catlett. (*Id*.) Plaintiff allegedly spoke with Catlett on two occasions and was told Catlett was going to talk to Garrett. Plaintiff also asked Catlett if he had the 602 paperwork, to which Catlett responded he received it, but could not recall where he had put it. (*Id*. p. 8 ¶ 5.)

On March 22, 2006, Plaintiff allegedly spoke with a doctor about the issue and was told someone would speak to Catlett. (*Id*.) Someone from medical allegedly spoke with Garrett and personally gave Garrett an accommodation chrono reflecting the need for a lower bunk. Garrett allegedly told that person he would have to talk to his "co-worker." (*Id.*) Plaintiff alleges there was an empty cell for seven days, eleven cells down from Plaintiff's cell. (*Id.* p. 9 ¶ 5.) Plaintiff alleges Catlett did not respond to the 602 inmate appeal within the California Code of Regulations title 15 time limits, nor was the 602 returned to Plaintiff. (*Id.*)

On March 29, 2006, Plaintiff submitted another 602 appeal. The appeals coordinator attached a Reasonable Modification or Accommodation Request form to the 602 in accordance with the Americans with Disabilities Act. (*Id.*) Plaintiff alleges, somewhat confusingly, that this was reviewed and denied by Defendant Catlett on April 25, 2006, and the disposition was rendered by Defendant Price on April 25, 2006, and approved by an unnamed associate warden on April 28, 2006, and returned to Plaintiff on May 9, 2006. Plaintiff also alleges Defendant Price reviewed and partially granted his appeal at the first level on April 25, 2006. (*Id.* p. 9 ¶ 6.) Plaintiff also alleges his accommodation request was reviewed at the second level by Defendant Bourland and partially granted on May 25, 2006, and was denied at the Director's Level on June 28, 2006. (*Id.*)

According to the inmate appeal documents, which Plaintiff references in his Complaint (Compl. p. 9 ¶¶ 5-6), on May 4, 2006, a form was generated moving Plaintiff to a lower bunk. (First Level Response by Price dated May 8, 2006, Second Level Response by Bourland dated May 30, 2006, attached to Plaintiff's inmate appeal dated March 29, 2006, attached as Exhibit 1 to the Declaration in support of the Request for Judicial Notice.) Because these documents were referenced in Plaintiff's Complaint, the Court may take judicial notice of facts referenced therein. *Bell Atlantic Corp. v. Twombly*, ___U.S. ___, 127 S.Ct. 1955, 1973 n. 13 (2007); Fed. Rule Evid. 201. "In ruling on a 12(b)(6) motion, a court may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice. [Citation.] However, in order to '[p]revent [ ] plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting . . . documents upon which their claims are based,' a court may consider a writing referenced in a complaint but not explicitly incorporated therein if the complaint relies on the document and its authenticity is unquestioned." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007).

Plaintiff alleges he experienced severe pain and swelling of his right knee as a result of jumping up to the upper bunk and coming down. (*Id.* p. 9 ¶ 5.)

B. Facts Relating To Plaintiff Being Denied His Walking Cane Due To a False Report.

On February 14, 2007, a chrono allowing Plaintiff to possess a walking cane was renewed. (Compl. p. 13 ¶ 16.)

Plaintiff, without providing any details, alleges that on August 17, 2007, Defendant Johnson falsified and fabricated allegations in a CDCR 837-A, A1 Cover Sheet/Supplemental Report dated August 17, 2007, which set in motion a criminal act committed by Defendant Catlett. (*Id.* p.13 ¶ 17.) That is, on August 17, 2007, Plaintiff alleges Defendant Catlett authored and generated a false general chrono (aka a "128-B") authorizing and approving confiscation of Plaintiff's cane by misrepresenting that information in Crime Incident Report Log # CAL-FBY-07-08-0240 supported removal of the cane, and further supported Plaintiff losing the ability to ever again possess a walking cane. (*Id.* p.13 ¶ 16.) Plaintiff alleges Defendant Catlett and Johnson were aware of the seriousness of Plaintiff's medical conditions and the risk of further injury. (*Id.* p.13 ¶ 17.) Plaintiff asserts he has been experiencing severe pain and swelling of his right knee as a result of the acts committed by Catlett and Johnson, i.e. removal of his walking cane. (*Id.* p.13 ¶ 17.)

Documents plaintiff references in his Complaint (Compl. pp. 13-14 ¶¶ 16-18) show observation booth officer Rivas, not named as a defendant, reported he observed Plaintiff "had a cane in his hands and was swinging it at" another inmate, and that correctional officer Neal, also not named as a defendant, observed Plaintiff "holding a cane in his right hand attempting to strike" that other inmate. (Crime Incident Report p. 7 of 15 [by Neal] and p. 11 of 15 [by Rivas], attached to Plaintiff's Inmate Appeal dated September 12, 2007, attached as Exhibit 4 to the Declaration in Support of the Request for Judicial Notice.) The observation booth officer also reported that medical staff determined the other inmate received a "laceration . . . consistent with being bludgeoned with the cane." (Rules Violation Report by Rivas dated August 17, 2007, attached to Plaintiff's Inmate

Appeal dated September 12, 2007, attached as Exhibit 4 to the Declaration in Support of the Request for Judicial Notice.)

Catlett's August 17, 2007, general chrono states that the crime report indicates Plaintiff was "observed utilizing his cane to assault another inmate, striking the other inmate numerous times with the cane," and that Plaintiff's continued possession of a cane would pose a threat to staff, inmates and the institution. (General Chrono by Catlett dated August 17, 2007, attached to Plaintiff's Inmate Appeal dated September 12, 2007, attached as Exhibit 4 to the Declaration in Support of the Request for Judicial Notice.) In his Complaint, Plaintiff does not specify the allegedly "falsified and fabricated allegations" by Defendant Johnson. (Compl. p. 13 ¶ 17.)

Plaintiff alleges he filed an inmate appeal on September 12, 2007, and that on October 16, 2007, the appeal was partially granted at the first level by Defendant Johnson, that he submitted the appeal to the second level where it was partially granted by Defendant Ochoa, and that he submitted it to the director's level. (*Id*. pp. 13-14 ¶ 18.)

The responses to Plaintiff's appeal show the general chrono indicating Plaintiff was observed striking the other inmate numerous times was revised to indicate Plaintiff was observed attempting to use his cane to assault another inmate. (First Level Appeal Response by Johnson dated October 16, 2007; Second Level Appeal Response by Ochoa dated November 14, 2007; revised General Chrono by Catlett dated August 17, 2007, attached to Plaintiff's Inmate Appeal dated September 12, 2007, attached as Exhibit 4 to the Declaration in Support of the Request for Judicial Notice.) The responses also indicate Plaintiff had been provided a replacement cane. (*Id*.)

C. Facts Relating To Plaintiff Being Denied A Walking Cane By Other Defendants.

Plaintiff alleges that on August 23, 2007, he appeared before Institutional Classification Committee (Committee) and was forced to walk a distance to the hearing without his walking cane. (Compl. p 17.) When the chairman of the committee, Defendant Janda, observed Plaintiff limping badly while entering the room, Janda asked Plaintiff what was wrong with his leg. (*Id*.) Plaintiff informed Janda his cane was unjustly confiscated on August 17, 2007, and expressed in great detail the seriousness of Plaintiff's many medical conditions and that he had been in severe pain and that his right knee had been swelling as a result of the unjust confiscation of his walking cane. (*Id.*) Plaintiff alleges Janda instructed Defendant Correctional Officer Widmann to go and get Plaintiff a cane. (*Id.*) This was allegedly not done; rather, Plaintiff was only issued a Health Care Services Request form by Widmann which Plaintiff was instructed to fill out and submit to medical. (*Id.*) This act was committed outside the presence of Defendant Janda. (*Id.*) Plaintiff repeatedly asked Defendant Widmann for a cane for nearly a month. (*Id.*) Plaintiff was experiencing severe pain and swelling to his right knee. (*Id.*) Plaintiff submitted several health care services requests requesting a walking cane and pain medication dosage increases. (*Id.* pp. 17-18.) Plaintiff alleges that on August 27, 2007 and August 29, 2007, medical personnel told Plaintiff that custody was preventing Plaintiff from receiving a cane. (*Id.* p. 18.)

Plaintiff alleges that on September 11, 2007, he filed a Reasonable Modification or Accommodation Request, and that he was interviewed on September 20, 2007, by Defendant Nelson, and that Nelson granted Plaintiff's accommodation request, and on September 24, 2007, Defendant Janda approved the disposition. (*Id.* p. 18 ¶ 29.)

D. Facts Relating To Denial Of Pain Medication.

Plaintiff alleges that on or about May 2007, he was taken to an outside hospital, examined and prescribed the pain medication Tramadol Hydrochloride by an orthopedic specialist. (Compl. p. 21 ¶ 36.) Plaintiff alleges that on June 17, 2007, Defendant Noriega, L.V.N., gave Plaintiff this pain medication for the first time, stating she did not know why Plaintiff had not been receiving this pain medication, and that she did not know when the pain medication had been approved but that she would let Plaintiff know the next day. (*Id.* p. 21 ¶ 37.) Plaintiff alleges that the next day on June 18, 2007, when Noriega was passing out pain medication, Plaintiff requested his pain medication but Noriega did not have it. (*Id.* p. 21 ¶ 38.) Noriega did not recall having given Plaintiff pain medication the day before, nor could Noriega give Plaintiff the date of approval of the pain medication. (*Id.*) Noriega wrote Plaintiff's name down and said she would check into the matter, but Noriega never got back to Plaintiff. (*Id.*) Plaintiff alleges Noriega and other medical staff were aware Plaintiff was in severe pain when he was denied his pain medication. (*Id.*)

Plaintiff alleges that on June 18, 2007, he filed an inmate appeal regarding the medication issue, and that on July 20, 2007, Plaintiff was interviewed by Defendant Salgado, R.N. at the first level of appeal. (*Id*. p. 21 ¶ 39.) Defendant Salgado allegedly told Plaintiff the medication was ordered on May 23, 2007, but was never noted. (*Id*. pp. 21-22 ¶ 39.) Salgado partially granted Plaintiff's appeal and Defendant Correa, Supervising R.N., approved the decision on or about July 24, 2007. (*Id*. p. 22 ¶ 39.) Plaintiff alleges he requested a second level review, and on August 30, 2007, his appeal was partially granted at the second level by Defendant Correa, and that Defendant Ball, Chief Physician/Surgeon approved the decision on or about August 30, 2007. (*Id*.) Plaintiff allegedly requested a director's level review, and on December 14, 2007, the appeal was denied by Defendant O'Shaughnessy, appeal examiner, who reviewed the matter for the Director of the California Department of Corrections and Rehabilitation. (*Id*.)

The inmate appeal documents which Plaintiff references in his Complaint show that on July 20, 2007, Defendant Salgado indicated he would discuss the issue with staff. (First Level Appeal Response by Salgado dated July 20, 2007, as part of Plaintiff's Inmate Appeal dated June 18, 2007, attached as Exhibit 2 to the Declaration in Support of the Request for Judicial Notice.) On July 25, 2007, when requesting a second level review, Plaintiff wrote he was appealing because he had not received the monetary compensation he requested for pain and suffering, that he had been experiencing severe pain in his right knee and lower back and had not seen the doctor to examine him and refill or prescribe pain medication and schedule right knee surgery. Plaintiff did not allege he had not started receiving the pain medication at issue as of that date. (Request for Second Level Review by Plaintiff dated July 25, 2007, as part of Plaintiff's Inmate Appeal dated June 18, 2007, attached as Exhibit 2 to the Declaration in Support of the Request for Judicial Notice.)

The Second Level Appeal Response indicates that Tramadol had been removed from the revised May 2007 California Department of Corrections and Rehabilitation formulary, and the resulting need to obtain clarification from Sacramento regarding usage of Tramadol caused a delay. (Second Level Appeal Response by Correa dated August 20, 2007, attached to Plaintiff's Inmate Appeal dated June 18, 2007, attached as Exhibit 2 to the Declaration in Support of the Request for

Judicial Notice.) The documents also indicate the appeal was denied at the director's level simply because all of Plaintiff's issues had been addressed by the institution except for the requested monetary compensation, and that the appeal process did not allow for monetary compensation at any level. (Director's Level Appeal Response by N. Grannis, reviewed on behalf of the Director of the California Department of Corrections and Rehabilitation by O'Shaughnessy dated December 14, 2007, attached to Plaintiff's Inmate Appeal dated June 18, 2007, attached as Exhibit 2 to the Declaration in Support of the Request for Judicial Notice.)

III.

LEGAL STANDARD FOR MOTION TO DISMISS

A Federal Rule of Civil Procedure 12(b)(6) motion to dismiss tests the sufficiency of the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

> Federal Rule of Civil Procedure 8 (a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'

Erickson v. Pardus, ___ U.S. ___, 127 S. Ct. 2197, 2200 (2007) (internal quotations omitted) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. ___, 127 S. Ct. 1955, 1964 (2007)). Nonetheless,

> [w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true . . .

Bell Atlantic Corp. v. Twombly, 127 S. Ct. at 1964-65 (internal citations and quotations omitted).

The Court must assume the truth of the facts presented and construe all inferences from them in the light most favorable to the nonmoving party when reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002); *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). While a court generally cannot consider material outside the pleadings in deciding a motion to dismiss, the Court may consider exhibits attached to, or referenced in, the complaint, and matter which is properly subject to judicial notice. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001); *Roth v. Garcia Marquez*, 942 F.2d 617, 625 n.1 (9th Cir. 1991); *In re Colonial Mortg. Bankers Corp.*, 324 F.3d 12, 16 (1st Cir. 2003); *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007).

Where a person appears in propria persona in a civil rights case, courts must construe the pleadings liberally and afford the plaintiff any benefit of the doubt. *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 623 (9th Cir. 1988). The rule of liberal construction is "particularly important in civil rights cases." *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). However, courts "may not supply essential elements of the claim that were not initially pled." *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982); *Bruns v. Nat'l Credit Union Admin.*, 122 F.3d 1251, 1257 (9th Cir. 1997). Additionally, the "court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). Although the court construes the complaint liberally, the court will not assume that defendants have violated a plaintiff's rights in ways that have not been alleged. *See Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

A court must give pro se litigants leave to amend the complaint "unless it determines the pleading could not possibly be cured by the allegations of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (citing *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)). Finally, before a pro se litigant's complaint may be dismissed, the court must provide the plaintiff with a statement of the deficiencies in the complaint. *Karim-Panahi*, 839 F.2d at 623.

IV.

DEFENDANTS SHOULD BE DISMISSED IN THEIR OFFICIAL CAPACITY BECAUSE PLAINTIFF REQUESTS ONLY MONETARY DAMAGES

States and state officers cannot be sued for damages in their official capacity in federal court. "The Eleventh Amendment immunizes states from private damage actions brought in federal court." *Henry v. County of Shasta*, 132 F.3d 512, 517 (9th Cir. 1997). Likewise, the Eleventh Amendment bars a suit for damages against state officials in their official capacities. *Regents of the University* *of California v. Doe*, 519 U.S. 425, 429 (1997); *Dittman v. California*, 191 F.3d 1020, 1025-26 (9th Cir. 1999). The Eleventh Amendment, however, does not bar actions against state officers in their official capacities as to declaratory judgment or injunctive relief. *Chaloux v. Killeen*, 886 F.2d 247, 252 (9th Cir. 1989).

Here, Plaintiff seeks monetary damages and not declaratory judgment or injunctive relief. (Compl. p.12 ¶ 15, p. 16 ¶ 25, p. 20 ¶ 35, p. 24 ¶ 48.)

Defendants respectfully request they be dismissed in their official capacity from Plaintiff's Complaint.

V.

THE FIRST COUNT SHOULD BE DISMISSED

In Count One, Plaintiff sues Defendants Catlett, Garrett, Arvizu, Price, Bourland, and Tilton (former Director/Secretary of CDCR) for violations of: 1) the Eighth Amendment's proscription against cruel and unusual punishment; 2) the Fourteenth Amendment's equal protection and due process protections; 3) the Americans with Disabilities Act; and, 4) the Rehabilitation Act. (Compl. p. 7 caption, p. 10 ¶ 7.)

A. Allegedly Not Assigning Plaintiff a Lower Bunk From February 6, 2006, To May 4, 2006, Did Not Amount To Cruel and Unusual Punishment In Violation Of The Eighth Amendment.

The Eighth Amendment is not a basis for broad prison reform. It requires neither that prisons be comfortable nor that they provide every amenity one might find desirable. *Rhodes v. Chapman*, 452 U.S. 337, 347-52 (1981); *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982). Rather, the Eighth Amendment proscribes the "unnecessary and wanton infliction of pain," which includes those sanctions that are "so totally without penological justification that it results in the gratuitous infliction of suffering." *Gregg v. Georgia*, 428 U.S. 153, 173, 183 (1976); *see also Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Rhodes*, 452 U.S. at 347. This includes any punishment incompatible with "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *see also Estelle v. Gamble,* 429 U.S. 97, 102 (1976).

To assert an Eighth Amendment claim for deprivation of humane conditions of confinement, a prisoner must satisfy two requirements: one objective and one subjective. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Under the objective requirement, the prison official's acts or omissions must be "sufficiently serious" - i.e. the actions must deprive an inmate of the "minimal civilized measure of life's necessities." *Id.*; *Allen v. Sakai*, 48 F.3d 1082, 1087 (9th Cir. 1994). Objectively, there is no Eighth Amendment violation so long as the institution "furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care, and personal safety." *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982) (internal quotations omitted).

The subjective component, which relates to the defendant's state of mind, requires "deliberate indifference." *Allen*, 48 F.3d at 1087. Deliberate indifference exists when a prison official "knows of and disregards an excessive risk to inmate health and safety; the official must be both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837.

The subjective element of deliberate indifference mandates an examination of the state of mind of the person imposing the deprivation.

> It is *obduracy and wantonness, not inadvertence or error in good faith*, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock.

Wilson v. Seiter, 501 U.S. 294, 299 (1991) (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986)) (italics in original; internal quotations omitted); *see LeMaire v. Maass*, 12 F.3d 1444, 1452 (9th Cir. 1993).

Although Plaintiff had a lower bunk chrono due to problems with his right knee/leg, he was allegedly not assigned a lower bunk for just under three months from February 6, 2006, to May 4, 2006. (Compl. p. 7-8 ¶¶ 1-3, p. 9 ¶¶ 5-6; First Level Response by Price dated May 8, 2006, Second Level Response by Bourland dated May 30, 2006, attached as Exhibit 1 to the Declaration in support of the Request for Judicial Notice.) That Plaintiff had to rely more heavily on other parts of his body than his right leg to get up and down from an upper bunk for less than three months is hardly a deprivation of the minimal civilized measure of life's necessities. Rather, it was an inconvenience which would make getting in and out of bed somewhat more methodical and time consuming, but which would not result in wanton infliction of pain. Thus, Plaintiff does not meet the objective component of an Eighth Amendment claim.

Even if he did, Plaintiff admits his cell mate suffered from a bad back, a bad knee and weighed well over 230 pounds. (Compl. p. 7 ¶ 3.) Thus, assigning Plaintiff to the upper bunk instead of his cell mate was not deliberate indifference toward Plaintiff; but rather, a simple and reasonable assessment of which inmate would have a more difficult time with the upper bunk. Thus, Plaintiff does not meet the subjective component of an Eighth Amendment claim. The Eight Amendment claim of Count One should be dismissed in its entirety.

Assuming arguendo Plaintiff has stated an Eight Amendment claim, this claim can stand only against Defendant Catlett. Defendants Garrett, Arvizu, Price, Bourland, Tilton (Director/Secretary of CDCR) should be dismissed from the Eighth Amendment claim in Count One. Garrett is alleged to merely have given Plaintiff back his inmate appeal paperwork and to have asked him to give it to another correctional officer, and later on, to have received an accommodation chrono from medical and responded to such receipt by saying he needed to talk to Catlett. (*Id.* at p. pp. 7-8 ¶ 3, 5.) Arivizu allegedly took the inmate appeal paperwork and gave it to Catlett within short order. (*Id.* at p. 8 ¶¶ 4-5.) Price allegedly both rendered a disposition denying Plaintiff's accommodation request for a lower bunk, then granted it that same day. (*Id.* at p. p. 9 ¶ 6.) Bourland allegedly reviewed the accommodation request at the second level and partially granted it. (*Id.* at p. p. 9 ¶ 6.) As for Tilton, the former Director/Secretary of the California Department of Corrections and Rehabilitation, it is unknown what he is accused of having done to violate Plaintiff's Eighth Amendment rights. Because liability under section 1983 is predicated upon an affirmative link or connection between the defendants' actions and the claimed deprivations, the allegations against Tilton and these other Defendants are insufficient to state a claim. *See Rizzo v. Goode*, 423 U.S. 362, 372-73 (1976); *May v. Enomoto*, 633 F.2d 164, 167 (9th Cir. 1980).

B. Allegedly Denying Plaintiff A Lower Bunk From February 6, 2006, To May 4, 2006, Was Not An Equal Protection Violation.

The Equal Protection Clause requires that persons who are similarly situated be treated alike. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). An equal protection claim may be established in two ways. One way to state a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause of the Fourteenth Amendment is for a plaintiff to "show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." *Barren v. Harrington*, 152 F.3d 1193, 1194-95 (9th Cir. 1998). Under this theory of equal protection, the plaintiff must show the defendants' actions were a result of the plaintiff's membership in a suspect class, such as race. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1166-67 (9th Cir. 2005).

If the action in question does not involve a suspect classification, a plaintiff may establish an equal protection claim by showing that similarly situated individuals were intentionally treated differently without a rational relationship to a legitimate state purpose. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *Squaw Valley Development Co. v. Goldberg*, 375 F.3d 936, 944 (9th Cir. 2004) (overruling on other grounds recognized by *Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1025 (9th Cir. 2007)); *SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 622, 679 (9th Cir. 2002). To state an equal protection claim under this theory, a plaintiff must allege that: 1) the plaintiff is a member of an identifiable class; 2) the plaintiff was intentionally treated differently from others similarly situated; and 3) there is no rational basis for the difference in treatment. *Village of Willowbrook*, 528 U.S. at 564.

In his Complaint, Plaintiff does not allege an equal protection violation. Rather, he complains he should have been singled out for different treatment because of his alleged disability. The equal protection claim in count one should be dismissed.

C. Plaintiff Does Not Allege A Due Process Violation.

Plaintiff's pleadings offer little explanation as to the basis for this Fourteenth Amendment due process violation apart from stating the Fourteenth Amendment was violated. Reading the Complaint liberally, however, Plaintiff appears to be attempting to assert he had a liberty interest in a lower bunk as a result of the lower bunk chrono.

The procedural guarantees of due process apply only when a constitutionally-protected liberty or property interest is at stake. *Ingraham v. Wright*, 430 U.S. 651, 672 (1977); *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972); *Schroeder v. McDonald*, 55 F.3d 454, 462 (9th Cir. 1995). Liberty interests protectable by the Fourteenth Amendment may arise from two sources - the Due Process Clause itself or state law or regulations. *Meachum v. Fano*, 427 U.S. 215, 224-27 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974); *Smith v. Sumner*, 994 F.2d 1401, 1405-06 (9th Cir. 1993). The Due Process Clause itself does not confer on inmates a liberty interest in avoiding "more adverse conditions of confinement." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). In fact, within the prison context, the Supreme Court has identified few protected liberty interests under the due process clause itself. *Serrano v, Francis*, 345 F.3d 1071, 1078 (9th Cir. 2003) (citing *Vitek v. Jones*, 445 U.S. 480, 493 (1980) (freedom from transfer to a mental hospital), and *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (freedom from the involuntary administration of psychotropic drugs)).

As to due process protections which arise from state law or regulations, the Supreme Court in *Sandin v. Conner*, 515 U.S. 472 (1995), held that constitutionally protected liberty interests are "limited to freedom from restraint which ... imposes atypical and significant hardships on the inmate in relation to the ordinary incident of prison life." *Id*. at 483-84. In short, plaintiffs must allege "a dramatic departure from the basic conditions" of confinement before they can state a procedural due process claim." *Id.* at 485. Here, having to use an upper bunk is not a dramatic departure from the basic conditions of confinement. Thus, there is no liberty interest implicated.

To the extent Plaintiff alleges a due process violation in connection with his inmate appeal, Plaintiff received all the process he was due in that his accommodation request was granted and he was moved to a lower bunk.

The due process claim in count one should be dismissed.

D. Plaintiff's Americans With Disabilities Act And Rehabilitation Act Claims Should Be Dismissed.

To prove a violation of Title II of the Americans with Disabilities Act (ADA), a plaintiff must show: (1) he is a qualified individual with a disability; (2) he was either excluded from participation in or denied the benefits of a public entity's services, programs or activities, or was otherwise discriminated against *by the public entity*; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability. *Weinreigh v. Los Angeles County Metropolitan Transp. Authority*, 114 F.3d 976, 978 (9th Cir. 1997); *see* 42 U.S.C. §§ 12132; *see Alsbrook v. City of Maumelle,* 184 F.3d 999, 1005 n. 8 (8th Cir.1999) ("Title II provides disabled individuals redress for discrimination by a 'public entity.' *See* 42 U.S.C. §§ 12132. That term, as it is defined within the statute, does not include individuals. *See* 42 U.S.C. §§ 12131(1).") (emphasis added). Similarly, under Section 504 of the Rehabilitation Act, a plaintiff must show: (1) he is an individual with a disability; (2) he is otherwise qualified to receive the benefit; (3) he was denied the benefits of the program solely by reason of his disability; and (4) the *program receives federal financial assistance*. *Weinreigh v. Los Angeles County Metropolitan Transp. Authority*, 114 F.3d at 978; *see* 29 U.S.C. § 794 (emphasis added).

Here, none of the Defendants are public entities, whether in their individual or official capacities, thereby precluding an ADA claim against them. Additionally, Plaintiff has not, and cannot allege the Defendants are programs that receive federal financial assistance, thereby precluding the Rehabilitation Act claim. This applies equally to the ADA and Rehabilitation Act claims in Counts Two, Three and Four.

Plaintiff should not be allowed to amend this claim to name public entity California Department of Corrections and Rehabilitation because such amendment could not possibly cure the defect. *Schreiber Distributing Co. v. Serv.-Well Furniture Co. Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1986). To recover monetary damages under Title II of the ADA or the Rehabilitation Act in a failure to accommodate case, the plaintiff must prove intentional discrimination, the standard for which is deliberate indifference. *Duvall v. County of Kitsap,* 260 F.3d 1124, 1138 (9th Cir.2001). Here, Plaintiff's request for a lower bunk was granted at the institutional level. (Compl. p.9 ¶¶ 5-6; First Level Response by Price dated May 8, 2006, Second Level Response by Bourland dated May 30, 2006, attached as Exhibit 1 to the Declaration in support of the Request for Judicial Notice.) In that Plaintiff was provided the accommodation of a lower bunk, there is no deliberate indifference on the part of California Department of Corrections and Rehabilitation.

VI.

THE SECOND COUNT SHOULD BE DISMISSED

In Count Two, Plaintiff sues Defendants Catlett, Johnson, Ochao and Tilton for violations of: 1) the Eighth Amendment's proscription against cruel and unusual punishment, including interference with/denial of medical treatment[1/]; 2) the Fourteenth Amendment's equal protection and due process protections; 3) the Americans with Disabilities Act; and, 4) the Rehabilitation Act. (Comp. p. 13 caption, p. 14 ¶ 19.)

Plaintiff alleges Defendant Catlett authored and generated a false general chrono which authorized and approved confiscation of his cane by misrepresenting that information in an incident report supported such confiscation, and further supported Plaintiff losing the ability to ever possess a walking cane. Plaintiff also alleges Defenant Johnson falsified and fabricated allegations on the cover sheet/supplemental report - but does not provide any hint as to the nature of the fabrication. (Compl. p. 13 ¶¶ 16-17.)

In the general chrono, Catlett stated Plaintiff was "observed utilizing his cane to assault another inmate, striking the other inmate numerous times with the cane," and that Plaintiff's continued possession of a cane would pose a threat to staff, inmates and the institution. (General Chrono by Catlett dated August 17, 2007, attached to Plaintiff's Inmate Appeal dated September 12, 2007, attached as Exhibit 4 to the Declaration in Support of the Request for Judicial Notice.) In actuality, Plaintiff was observed by observation booth officer Rivas with "a cane in his hands and was swinging it at" another inmate, and by correctional officer Neal "holding a cane in his right hand

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1. Plaintiff improperly labels his interference with/denial of medical treatment a First Amendment violation.

attempting to strike" that other inmate. (Crime Incident Report p. 7 of 15 [by Neal] and p. 11 of 15 [by Rivas], attached to Plaintiff's Inmate Appeal dated September 12, 2007, attached as Exhibit 4 to the Declaration in Support of the Request for Judicial Notice.) The observation booth officer also reported that medical staff determined the other inmate received a "laceration ... consistent with being bludgeoned with the cane." (Rules Violation Report by Rivas dated August 17, 2007, attached to Plaintiff's Inmate Appeal dated September 12, 2007, attached as Exhibit 4 to the Declaration in Support of the Request for Judicial Notice.)

Improperly indicating Plaintiff was observed "striking" an inmate numerous times with his cane, instead of indicating Plaintiff had been observed "swinging [his cane] at" the inmate by one officer and "attempting to strike" the inmate with the cane by another, and that the inmate had a "laceration . . . consistent with being bludgeoned with the cane," clearly does not meet the requirement of causation. The actual observations made by more than one correctional officer of seeing Plaintiff wielding his cane against an inmate along with the medical evidence the inmate had an injury consistent with being pummeled by a cane was more than adequate to result in the removal of Plaintiff's cane.

As to an alleged due process violation, even if one could be extracted from these facts, the documents Plaintiff referenced in his Complaint show that the general chrono was corrected to properly reflect the actual observations. (First Level Appeal Response by Johnson dated October 16, 2007; Second Level Appeal Response by Ochoa dated November 14, 2007; revised General Chrono by Catlett dated August 17, 2007, attached to Plaintiff's Inmate Appeal dated September 12, 2007, attached as Exhibit 4 to the Declaration in Support of the Request for Judicial Notice.) The ADA and Rehabilitation Act claims, as discussed above, are not available against non-public entity Defendants. In addition, Plaintiff cannot state a claim against California Department of Corrections and Rehabilitation because he was not discriminated against or denied accommodation.

Count Two of the Complaint should be dismissed without leave to amend because amendment would not cure the defects.

VII.

THE THIRD COUNT SHOULD BE DISMISSED

In Count Three, Plaintiff sues Defendants Widmann, Nelson, and Janda for violations of: 1) the Eighth Amendment's proscription against cruel and unusual punishment; 2) the Fourteenth Amendment's equal protection and due process protections; 3) the Americans with Disabilities Act; and, 4) the Rehabilitation Act. (Comp. p. 17 caption, p. 18 ¶ 30.)

Plaintiff alleges that at an Institutional Classification Committee hearing on August 23, 2007, Defendant Janda, after observing Plaintiff limping badly while entering the room and hearing Plaintiff's story about the confiscation of his cane, instructed Correctional Officer Defendant Widmann to get Plaintiff a cane. Allegedly instead of getting Plaintiff a cane, unbeknownst to Janda, Defendant Widmann issued Plaintiff a Health Care Services Request form and instructed Plaintiff to fill it out and submit it to medical. Plaintiff allegedly repeatedly asked Widmann about his cane and submitted several requests to health care services but was told on August 27, 2007, and August 29, 2007, "custody" was preventing Plaintiff from receiving a cane. On September 11, 2007, Plaintiff filed an accommodation request form regarding the cane; he was interviewed on September 20, 2007, by Defendant Nelson and granted the cane accommodation on September 24, 2007, the disposition of which was approved by Defendant Janda. (Compl. pp. 17-18.) Accordingly, there are no allegations against either Defendants Janda or Nelson to even arguably support any claim in Count Three.

As to Defendant Widmann, instead of grabbing a cane from medical, he promptly provided Plaintiff paperwork needed to obtain a replacement cane in a manner which would allow Plaintiff to legitimately possess the cane on prison grounds. Plaintiff alleges he was told "custody," not Widmann, was preventing Plaintiff from receiving a cane. Plaintiff alleges he repeatedly asked Widmann for the cane, but does not allege Widmann, as a Correctional Officer, had any authority to go around the paperwork and around medical to provide Plaintiff with a cane. Thus, Plaintiff fails to allege facts showing deliberate indifference against Widmann as to the Eighth Amendment claim and causation as to any of the claims. In his Complaint, Plaintiff admits Widmann is a correctional officer. (Compl. p. 4.) Thus, Plaintiff could not legitimately amend to claim Widmann had authority to assign Plaintiff a cane.

Count Three of the Complaint should be dismissed without leave to amend because amendment would not cure the defects.

VIII.

THE FOURTH COUNT SHOULD BE DISMISSED

In Count Four, Plaintiff sues Defendants Noriega, Salgado, Correa, Ball, O'Shaughnessy, and Tilton (Director/Secretary of CDCR) for violations of: 1) the Eighth Amendment's proscription against cruel and unusual punishment, including interference with/denial of medical treatment [2/]; 2) the Fourteenth Amendment's equal protection and due process protections; 3) the Americans with Disabilities Act; and, 4) the Rehabilitation Act.

Plaintiff alleges he was prescribed pain medication Tramadol in May 2007, by an outside physician, but was only given the medication for the first time on June 17, 2006. When Defendant Noriega L.V.N. gave Plaintiff the medication, Noriega did not know why Plaintiff had not received his medication before that date or when the pain medication had been approved. The next day Plaintiff requested his pain medication from Noriega, but she did not have it, nor did she recall having given Plaintiff the medication the day before, nor could she tell Plaintiff the date the pain medication had been approved. Noriega wrote Plaintiff's name down and said she would check, but she never got back to him.

On June 18, 2007, Plaintiff filed an inmate appeal and was interviewed on July 20, 2007, by Defendant Salgado, R.N., who partially granted his appeal. Plaintiff began receiving the medication at least by July 25, 2007. Plaintiff"s medication had been ordered on May 23, 2007, but this was never noted. In addition, Tramadol had been removed from CDCR's formulary in May 2007, resulting in delay while staff obtained clarification from Sacramento. On July 24, 2007, Defendant Correa, supervising R.N., approved Salgado's decision to partially grant Plaintiff's appeal. Plaintiff

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2. Plaintiff improperly labels his interference with/denial of medical treatment a First Amendment violation.

requested a second level review, and on August 30, 2007, his appeal was partially granted at the second level by Defendant Correa and this was approved by Defendant Ball. Plaintiff requested a third level review, and on December 14, 2007, this was denied by Defendant O'Shaughnessy because all of Plaintiff's issues had been addressed by the institution except for the requested monetary compensation, and the appeal process did not allow for monetary compensation at any level.[3/]

In that all Defendants except Defendant Noriega were involved in ensuring Plaintiff timely received his medication and/or simply reviewed his appeal after he began receiving the medication, there is no support for a claim of violation of the Eighth Amendment or the Fourteenth Amendment (or the ADA or Rehabilitation Act as previously addressed) against Defendants Salgado, Correa, Ball, O'Shaughnessy, and Tilton. As to Noriega, the allegations are not sufficient to satisfy the subjective prong of an Eighth Amendment claim.

Not every breach of the duty to provide medical care creates a constitutional cause of action. *Hutchison v. United States*, 838 F.2d 390, 394 (9th Cir. 1988). To establish an Eighth Amendment claim that prison authorities provided inadequate medical care, a plaintiff must show that defendants themselves were deliberately indifferent to his serious medical needs. *Helling v. McKinney*, 509 U.S. 25, 32 (1993); *Estelle v. Gamble*, 429 U.S. 97, 104 & 106 (1976). Deliberate indifference may be manifest by the intentional denial, delay, or interference with a plaintiff's medical care, or by the manner in which the medical care was provided. *See Estelle*, 429 U.S. at 104-05; *McGuckin v.*

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3. Compl. pp. 21-22 ¶¶ 36-39; First Level Appeal Response by Salgado dated July 20, 2007, as part of Plaintiff's Inmate Appeal dated June 18, 2007, attached as Exhibit 2 to the Declaration in Support of the Request for Judicial Notice; Request for Second Level Review by Plaintiff dated July 25, 2007, as part of Plaintiff's Inmate Appeal dated June 18, 2007, attached as Exhibit 2 to the Declaration in Support of the Request for Judicial Notice; Second Level Appeal Response by Correa dated August 20, 2007, attached to Plaintiff's Inmate Appeal dated June 18, 2007, attached as Exhibit 2 to the Declaration in Support of the Request for Judicial Notice; Director's Level Appeal Response by N. Grannis, reviewed on behalf of the Director of the California Department of Corrections and Rehabilitation by O'Shaughnessy dated December 14, 2007, attached to Plaintiff's Inmate Appeal dated June 18, 2007, attached as Exhibit 2 to the Declaration in Support of the Request for Judicial Notice.

Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other grounds, WMX Technologies v. Miller,* 104 F.3d 1133 (9th Cir. 1997). The defendants must purposefully ignore or fail to respond to a plaintiff's pain or medical needs in order for deliberate indifference to be established. *See McGuckin,* 974 F.2d at 1060. Negligence, inadvertence, or differences in medical judgment or opinion do not rise to the level of a constitutional violation. *Estelle v. Gamble,* 429 U.S. 97, 105-06 (1976); *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996), *cert. denied* 519 U.S. 1029 (1996).

At most, Defendant Noriega, L.V.N., was negligent in allegedly not following up on June 18, 2007, when she told Plaintiff she would check on the status of his medication. Plaintiff, however, filed an inmate appeal that same day regarding the status of the medication. This action resulted in the clearing up of the mix-up with his medication. As to a due process violation, Noriega did not "deny" Plaintiff his medication without due process. Plaintiff admits Noriega gave him the medication one day, and the next day told him she would check into why she did not have any for him. A Plaintiff who fails to allege any specific proceedings in which his due process rights were violated does not state a claim. *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998).

Count Four of the Complaint should be dismissed without leave to amend because amendment would not cure the defect.[4/]

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4. Plaintiff cannot amend to make a claim for violation of the ADA or Rehabilitation claim against CDCR because Plaintiff was not discriminated against or denied accommodation.

CONCLUSION

For the foregoing reasons, Defendants respectfully request this Court dismiss Plaintiff's Complaint in its entirety without leave to amend.

Dated: June 10, 2008

Respectfully submitted,

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